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The agitation of the subject of inheritance tax, in States which have not already adopted that form of taxation, gives special value to such cases as Kochersperger v. Executors, recently decided by the Supreme Court of Illinois, in which that court declares constitutional a recent enactment of the legislature of that State providing for a succession tax. The court in announcing its opinion make the point that the law of descent and the right to devise and take under a will within the State of Illinois owe their existence to the statute law of the State. The right to inherit and the right to devise being dependent on the legislative acts, there is nothing in the constitution of that State which prohibits a change of the law with reference to those subjects at the discretion of the law-making power. The law of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death and the ownership of which the State then provides for by the law of descent or devise.

The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto. To deny the right of the State to impose such a burden or condition is to deny the right of the State to regulate the administration of a decedent's estate.

When, by the act of June 15, 1895, for the taxation of gifts, legacies and inheritances in certain cases, the legislature prescribed that a certain part of the estate of the deceased person should be paid to the treasurer of the proper county for the use of the State, it was in effect an assertion of sovereignty in the estate of the deceased persons.

Whether to be levied and determined as a tax or penalty, the principle is that where one owning an estate dies that estate is to be assessed in accordance with those provisions of the act and the tax to be paid for the right of inheritance. The amount reserved to the State from the estate of a deceased owner is not a tax on the estate, but on the right of succession.

The constitution of Illinois provides as follows:

"Sec. 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, showmen, jugglers, inn-keepers, grocery keepers, liquor dealers, toll-bridges, ferries, insurance, telegraph and express interests or business, venders of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct, by general law, uniform as to the class upon which it operates.

"Sec. 2. The specifications of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

Under these provisions of the constitution it was insisted before the Illinois court that the levy of the succession tax, which, under the above provisions, is required to be made by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, and that such law shall be uniform as to the class upon which it operates, is defeated by the provisions of the statute. But the court met this contention by saying that the statute provides certain classes of property which was a part of an estate shall be exempt from taxation under these provisions, and when the legislature provides other classes of property, some of which shall pay $1 per $100, others, $2, others $3, and others $4, and still others $5, and again others $6 per $100, six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property. The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class. A tax which affects the property within a specific class is uniform as to the class, and there is no provision of the con-

stitution which precludes legislative action from assessing a tax on that particular class.

By this act of the legislature, says the court, six classes of property are created heretofore absolutely unknown. It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise. The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited, and is not inconsistent with the principle of taxation fixed by the constitution, and is clearly within the sections of the constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statutes, and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown.

Laws of this character have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina and other States. They have been held invalid in New Hampshire and Ohio, and some other States.

The Illinois court declined to enter into an analysis of these cases and a consideration of the principles on which they have become decided. The broad principle presented is that the legislature may create new classes of property with reference to estates under which they may regulate the right to inherit or devise or take under devise, and such right existing, such classes may be created, and as created may be uniform, and the assessment by valuation when declared to operate equally on the right of succession to such classes is not a violation of the provisions of the sections of article 9 of the constitution of the State of Illinois. Justice Phillips wrote the opinion of the court and Justice Craig dissented.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATION—CITY ORDINANCE—STREET PARADE.—In a proceeding entitled *In re* Gribben, 47 Pac. Rep. 1074, in the Supreme Court of Oklahoma, it was held that a city ordinance providing that "the making of any noise upon the streets or sidewalks of the city, by means of drums or musical instruments or otherwise, of such a character, extent and duration as to annoy and disturb others, is hereby prohibited; and it is hereby made the duty of the mayor and the city marshal to order any person or persons making such noise to desist therefrom, and the failure or refusal of such person or persons to promptly obey such order of the mayor or city marshal is hereby declared to be a misdemeanor," and providing punishment therefor by fine or imprisonment, is invalid, because unreasonable, and not essential or indispensable to carrying into effect any of the purposes for which a city is created, and is oppressive and in contravention of common rights. Equally as stringent limitations of the inherent power of a municipal corporation to pass ordinances on this subject were also upheld in Frazee's Case, 30 N. W. Rep. 72, by the Supreme Court of Michigan, and in Anderson v. City of Wellington, 40 Kan. 173. But see *In re* Flaherty, 38 Pac. Rep. 981, 40 Cent. L. J. 247.

CRIMINAL LAW — ALIBI—EVIDENCE—REASONABLE DOUBT.—The question of proof of an alibi arose in McNamara v. People, 48 Pac. Rep. 541, decided by the Supreme Court of Colorado. The prosecution was for an assault with intent to rob, and the court held that where defendant relies on the defense of alibi, he must be acquitted if the evidence is sufficient to raise a reasonable doubt, and that where the jury are erroneously charged that the burden is on defendant to prove an alibi, the error is not cured by adding that, "when the jury have considered all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused," they should acquit him. The court on these points, say:

> A more serious question is presented by the assignments based upon the refusal of the court to give the instruction requested by defendant, and in giving those complained of upon the subject of alibi. The court evidently misapprehended the nature of this defense, and, instead of treating it as a traverse of a fact that it was incumbent upon the prosecution to establish, to-wit, the presence of defendant at the time

and place of the occurrence, regarded it as an affirmative and independent defense that the law imposed the burden of proving upon the accused. The jury were told that, if they believed from the evidence that "an alibi had been established by or on behalf of defendant, and that at the time when the prosecuting witness alleges that the robbery was committed at the place alleged in the indictment, that the defendant at such time was in Altman or elsewhere than at such place," they should find him not guilty. This was clearly erroneous. In order to avail himself of the defense of alibi, it is not incumbent upon the accused to establish that he was not present at the commission of the crime, or that he was in some other place. If the evidence is sufficient to raise a reasonable doubt in the minds of the jury as to whether he was or was not present at the commission of the crime, he is entitled to an acquittal. As was said by this court in Kent v. People, 8 Colo. 563, 9 Pac. Rep. 852: "It may, therefore, be laid down as the established doctrine of this State that as to all facts in evidence properly constituting part of the *res gestæ*, they are to be considered by the jury in passing upon the question of guilt or innocence, without discrimination as to rules of evidence, whether introduced by the prosecutor or the defendant. • • • The rule relating to the *res gestæ*, which we have been considering, applies to all defenses which traverse the averments of the indictment and go to the essence of the guilt charged against the accused. Within this class may be mentioned • • • all matters growing out of the *res gestæ* which go to justify, extenuate, or excuse the crime charged, including the defense of alibi. Some authorities hold an alibi to be an independent defense, not coming within the rule mentioned; but the weight of authority is against this view. The later authorities hold it to be an essential averment of the indictment that the accused was present, and committed or participated in the commission of the offense. Hence this averment must be established by the prosecution beyond a reasonable doubt; and if the proof leaves it doubtful in the minds of the jury whether the defendant was present at or absent from the place at the time the crime was committed, he must be acquitted." In the sixteenth instruction the jury are expressly told that the burden is on the defendant to make out his defense as to an alibi, thus emphasizing the incorrect rule stated in No. 15. We do not think that what follows cures this error. In support of the doctrine announced in Kent v. People, *supra*, the court cites, among other cases, Howard v. State, 50 Ind. 190. The instruction condemned in the latter case is very similar to the one before us, and was as follows: "(6) • • • And if the evidence satisfies your minds that the defendant was in fact in the city of Indianapolis at the time that the witnesses on behalf of the State testify that he was in the town of Noblesville and other points in the county of Hamilton, it will be your duty to acquit the defendant; and if that evidence, in connection with all the evidence given on the trial of this cause, leaves a reasonable doubt in your minds as to the presence of the defendant in the county of Hamilton on the day the horse and buggy are alleged to have been stolen, it will be your duty to acquit the defendant." The court say: "We hold that the sixth instruction, *supra*, on the subject of alibi, was erroneous in charging that, 'if the evidence satisfies your minds that the defendant was in fact in he city of Indianapolis at the time that the witnesses, on behalf of the State testified that he was in the town of Noblesville and other points in the county of Hamilton, it will be your duty to acquit the defendant.' This instruction ought to have been that, 'if the evidence raises a reasonable doubt in your minds as to whether the defendant was at Indianapolis or at Noblesville when the larceny was committed, you ought to find the defendant not guilty.' We do not think that anything that precedes or follows this error, in this or any other instruction given, cures it. An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction which states the law accurately, unless the erroneous one be plainly withdrawn." Among the many cases to the same effect are: Turner v. Com., 86 Pa. St. 54; Walters v. State, 39 Ohio St. 215; State v. Josey, 64 N. C. 56; State v. Taylor, 118 Mo. 153, 24 S. W. Rep. 449; Walker v. State, 42 Tex. 360; State v. Waterman, 1 Nev. 543; Pollard v. State, 53 Miss. 410; Adams v. State, 42 Ind. 273; People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. Rep. 233; Clare v. People, 9 Colo. 122, 10 Pac. Rep. 799; Ritchey v. People (Colo. Sup.), 40 Pac. Rep. 384. In State v. Taylor, *supra*, the defense of alibi is discussed at length, and the decisions upon the subject carefully reviewed; and it is shown that the great weight of authority in this country is against the doctrine that an alibi must be established by the defendant; there being but two States—Illinois and Iowa, and the territory of New Mexico committed to that doctrine. As will be seen from the above quotation from Kent v. People, this court has aligned itself with the majority of the courts of this country upon this subject, and has repudiated the doctrine of the Illinois courts embodied in the instructions under consideration. That the giving of these instructions and refusing the ninth request of defendant, which we have seen correctly expresses the law applicable to this defense, was prejudicial to the rights of the defendant, is quite probable, when considered in connection with the facts in the case, which, in brief, are as follows: During the existence of what is known as the "Cripple Creek Strike," and on the morning of May 29, 1894, John Simmons, the principal witness for the prosecution, was driving a vehicle containing eight or nine passengers from Cripple Creek to the terminus of the railroad, and at a point about two miles from Cripple Creek was approached by a man on horseback, with a rifle at his shoulder, who commanded him to halt. In compliance with this demand, Simmons stopped his team, whereupon the horseman road up to the side of the hack, and inquired several times of the occupants if there were any guns in there; and upon being answered by the persons addressed that they had no guns, he rode away. On the same morning, and at about the same place, another vehicle, driven by Frank Sahrbeck, and in which Mrs. Jane Leonard was riding, was also stopped by a man on horseback, armed with a rifle. Of those who were at the time in the first vehicle but two besides Simmons testified in the case. Upon the question of the identity of the defendant with the man on horseback the testimony is conflicting. Simmons and one Mace, who claims to have witnessed the transaction at the stage from a distance of about 150 yards, and Sahrbeck, identify the defendant as the man; while John Mallory and Frank Finnigan, two of the passengers in the stage, and Mrs. Leonard, testified that the defendant is not the person. The defendant introduced eight witnesses whose testimony tended to show that he was at the town of Altman at and during the time the offense is shown to have been committed. In view of the fact that the evidence of the prosecution as to the presence of the defendant at the commission of the crime is in substantial conflict, it was of vital importance to him that the evidence intro-

duced upon the defense of alibi should have been submitted to the jury under proper instructions. As we have seen, this was not done. The judgment and sentence, therefore, must be reversed, and the cause remanded for a new trial.

TRIAL — DAMAGES — PHYSICAL EXAMINATION.—In Cleveland, C., C. & St. L. Ry. Co. v. Huddleston, 46 N. E. Rep. 678, it was held by the Supreme Court of Indiana, that a plaintiff in an action for personal injuries alleged to cause the secretion of albumen and sugar in the urine may be required to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was voided by him; the privacy of his person not being thereby invaded, and that plaintiff's rights are fully protected by a requirement that such specimens be "produced in court" for analysis by "proper experts," since the selection of the experts and the regulation of the examination are committed to the court. The court says in part:

We do not see that the making of the order as requested would have been any invasion of the personal rights of the appellee, and, if not, there can be no reason why appellant should be deprived of the use of any evidence which might result from such proposed analysis. The ruling of the court it seems, was based upon decisions of this and other courts denying the right of a court to subject a party to an examination of his person for the purpose of enabling the adverse party to secure desired evidence. Such examination is held to be an invasion of the right of the person—an indignity to which, in the absence of a positive statute, no one should be subjected against his will. In Kern v. Bridwell, 119 Ind. 226, 21 N. E. Rep. 664, which was an action by an unmarried woman for slander, where it was alleged that the defendant had spoken of the plaintiff as a whore, and that she had become pregnant and had suffered an abortion to be procured upon her, it was held that the defendant was not entitled, under a plea of justification, to an order requiring the plaintiff to submit her person to an examination by medical experts. In Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. Rep. 860, which was an action for damages alleged to have been received at a railroad accident, the trial court refused to require the injured party to submit to an examination of his person by surgeons to be appointed by the court for that purpose, and that ruling approved by this court. The court there quoted from was Railway Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1001, that: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law, in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." See, also, Railroad Co. v. Finlayson (Neb.), 49 Am. Rep. 724, and note (s. c., 20 N. W. Rep. 860). In the three cases first above cited, which are those relied upon to sustain the action of the court in overruling the motion here under consideration, it will be seen that it is the trespass upon the sacred privacy of the person that the law refuses to sanction. But urine which has passed from the body is no part of the person. It is a lifeless substance, separated forever from the individual, and it can be no more indignity to his person to subject such substance to examination and analysis than it would be to require a like examination of the cast-off clothing of the same individual. It is said in 4 Elliott, R. R. § 1700, that: "The clothing of one who is killed by the alleged negligence of a railroad company may, it seems, be exhibited in evidence, where it tends to establish such negligence as the cause of his death; and other 'real evidence,' such as defective machinery, iron rails, and the like, may be introduced and exhibited to the jury in a proper case." And see 2 Elliott, Gen. Prac. §§ 682, 685. Counsel have cited no authority directly in point to show that it is any violation of personal rights to compel the production in court of a specimen of urine. Appellee himself could not have considered it any indignity to him to furnish such specimen to be used in evidence, inasmuch as he voluntarily produced a specimen for the use of his counsel, which was analyzed by physicians selected by them, and the evidence then detailed in court. Why he should have the right to use such evidence, and yet, on the plea of indignity to his person, refuse to allow the adverse party to use the same evidence, is not at all clear. See Haynes v. Town of Trenton, 123 Mo. 326, 27 S. W. Rep. 622. It would seem that the case is not essentially different from that of a like examination preparatory to life insurance, where it has never been considered that insurance companies have passed the bounds of propriety in requiring such opportunity to learn the physical condition of an applicant for insurance. It is not in any way a question as to exposure of the person or invasion of privacy. The production of the urine, accompanied by an affidavit that it was voided by appellee, does not involve any exposure of the person. Courts of equity, as said in 2 Rice, Ev. § 416, proceed on the principle that it is against conscience that a party having knowledge, or the means by which knowledge could be obtained, of facts material to the litigation, should obtain an advantage to himself, to the sacrifice of the development of truth, and consequent working of injustice, by withholding and concealing such knowledge and means. "Upon this principle," it is added, "a discovery of books, papers, and documents is ordered," and "the principle clearly covers and authorizes the compulsory discovery, in a proper case, of things or substances other than books, papers," etc. As, therefore, no indignity against the person of the appellee was involved, we are unable to discover any sufficient cause why he should not have been required to produce in court the urine asked for by the motion. All question as to the right of privacy and the sacredness of the person being eliminated, every reason for exclusion of the proposed evidence disappears. Nor was there anything unfair in the manner of the request. The appellant did not ask that the urine should be given to appel-

lant's counsel, or to its experts or physicians. The request was that the appellee "produce in court, at such time, at or in advance of the trial, as the court may order, specimens of his urine, that it may be examined and analyzed by proper experts and physicians." That was ample protection to appellee from any danger of manufactured evidence. All would be under direction of the court. The court would determine who were "proper experts and physicians." The request was certainly a reasonable one. It was in the interests of a fair and impartial trial. If the analysis made and testified to by appellee's experts were correct, the analysis to be made by experts appointed by the court would but confirm it. If, however, there should be found error in the analysis already made, it was but right that such error should be disclosed, to the end that justice might be done between the parties. Other questions discussed by counsel need not, as we think, be considered, as they may not arise on another trial. Judgment reversed, with instructions to grant a new trial.

RECOVERY ON QUANTUM MERUIT BY SERVANT WHERE HE ABANDONS SERVICE OF MASTER.

A striking example of the indisposition of courts to change the rules of law which have obtained for any great length of time, no matter how much injustice may be worked by the enforcement of the rule, is that rule which obtains in many of our States to the effect that when a person having agreed to work for another for a definite period of time, voluntarily leaves such service without any fault on the part of the master, and without his consent, before the expiration of the term, he cannot recover in any form of action for the services actually rendered. The reason of this rule as laid down in an early case in Massachusetts, is that the plaintiff cannot recover on his express contract, because he had not executed it on his part, and that performance is a condition precedent to the payment, and that no recovery could be had under a *quantum meruit* because an express contract always excludes an implied one in relation to the same matter.[1] This principle was conclusively established by a large number of courts at that time, most of which have not changed the rule up to the present time.[2] The first American decision contrary to this rule of law was laid down by the Supreme Court of New Hampshire in 1834.[3] Since this decision a number of States have subsequently followed the rule there laid down, but they are still in the minority, and but few text writers have advocated the New Hampshire rule. Wood in his work on Master and Servant, commenting on the case of Britton v. Turner says that it does not meet with general favor, and that it is held in nearly all the States that full performance of an entire contract for services must precede a right of recovery, and a failure in that respect, even to the extent of a single day, is fatal to the servant's right to recover any wages for the term.[4] And in Sutherland on Damages the rule is laid down as follows: "Where there is an express contract none can be implied relating to the same subject. On this principle, and so far as it governs, if work is done under a special contract, recovery for it can only be had by action on the contract, or at least where an action on the contract could be maintained; and when it appears that compensation has been earned, and is due according to its provisions. Accordingly under an agreement which is entire, to pay a gross sum for a particular term of service, or for doing a particular piece of work, the doing of the work is a condition and no action can be maintained on the contract without alleging and proving that the condition has been fulfilled. In respect to contracts for services the rigorous rule is generally enforced; and where there is a hiring for a particular term as an entire contract there can be no recovery if the party hired voluntarily quits without cause or the consent of his employer, before the expiration of the term." To the same effect is Mr. Parsons in his work on Contracts, laying down the rule that if A and B agree together that A shall enter into the service of B, and continue for one year, and that B shall pay him therefor the sum of one hundred dollars; and A enters the service accordingly and continues half of the year, and then leaves, he will not be entitled to recover anything on the contract. The author adds: "This is an old and deep rooted principle of the common law, and though it sometimes has the appearance of harshness, it would be

[1] Olmstead v. Beale, 19 Pick. 528.

[2] Lantry v. Parks, 8 Cowen, 62; Marsh v. Rulesson, 1 Wend. 514; DeCamp v. Stevens, 4 Blackf. (Ind.) 24; Davis v. Maxwell, 12 Metcalf (Mass.), 286; Gillis v. Space, 63 Barb. (N. Y.) 177; Clark v. School Dis., 24 Vt. 217; Larkin v. Buck, 11 Ohio State, 561; Hutchinson v. Whetmore, 2 Cal. 310; Eldridge v. Rowe, 7 Ill. 91; Martin v. Schoenberger, 8 W. & S. (Penn.) 367.

[3] Britton v. Turner, 6 N. H. 481.

[4] Wood, Master and Servant, § 145.

difficult to contend against it on principle."[5] It would seem that in view of the authorities cited that the great preponderance of the cases are to the effect that there can be no recovery by a servant for part performance of an entire contract. Yet it is a peculiar fact that nearly every judge in ruling against the plaintiff in such actions recognizes the fact that it works a hardship on the servant but at the same time says that the weight of the reason of the law is that there should be no recovery. Inasmuch as justice is the foundation upon which the structure of the law is erected it does not seem proper that a rule of law should be followed which always works more or less injustice to the servant when a number of courts have formulated a rule whereby it is as impossible to work injustice as the imperfections of human institutions will permit. The true rule should be that laid down in the case of Britton v. Turner, which is substantially as follows:

"The party performing work and labor for another and abandoning the service before the agreed term expires should recover the reasonable value of the services he has performed after deducting the loss sustained by the master by reason of the abandonment of the work." Not only does this rule further the ends of justice, but it is also founded on good reason. Outside of merely technical reasons the real reason that a servant cannot recover for his services where he abandons an entire contract is that the benefit his labor has given to the master is supposed to be a compensation for the injury sustained by the master by reason of the abandoment of the service. That this is unfair is apparent when we consider that it does not make the amount of damages at all proportionate to the real injury sustained by the master. If a servant agreeing to work for one year works one week and abandons his service, the injury to his master by reason of the abandonment, may be a good deal greater than if he worked for him ten months before abandoning his position. Yet under the old rule the compensation for the breach, by way of services rendered to the master in the first case would only be one-fortieth part of what it would be in the second case. In case the servant should be aggrieved by the master discharging him without cause before the expiration of the term of service, it would be just as reasonable to set the servant's damages at the full amount of the wages which the master has contracted to pay him for the entire term of service, regardless of the actual damage sustained, whereas the measure of damages in fact is the amount of actual injury the servant has suffered. In case the servant immediately secures other employment for a like remuneration, for the same length of time, he would have no more than merely nominal damages for the breach of the contract by the master, and in all fairness the rule should operate so that the master would obtain only the amount of damages which he actually sustains when the servant abandons his service; the servant should not be compelled to lose the whole amount of his service regardless of its actual value. That the New Hampshire rule is just, cannot be denied, and that it comports with reason is strongly shown by a number of well considered cases in many different States.[6] The rule laid down by these cases is just, as will be admitted even in the opinions of judges when holding a contrary opinion, and it should be only a question of time when every State in the union holds the same.

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[5] 2 Parsons on Contracts, 651.

[6] Duncan v. Baker, 21 Kan. 99; Pixler v. Nichols, 8 Iowa, 106; McClay v. Hedge, 18 Iowa, 66; Wolf v. Gerr, 43 Iowa, 339; Burkholder v. Burkholder, 25 Neb. 270; Hollis v. Chapman, 36 Tex. 1, 5; Lamb v. Brolaski, 38 Mo. 51; Ryan v. Dayton, 25 Conn. 188; Allen v. McKibbin, 5 Mich. 449.

ESCROWS—REVOCATION—DEEDS—DELIVERY.

DAVIS v. CLARK.

Supreme Court of Kansas, April 10, 1897.

1. An escrow is an obligatory writing delivered by the obligor to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, upon the performance of which condition or the occurrence of which contingency it becomes of full force and effect.

2. The depositary of an escrow is the agent of both the parties to the same. The contract of deposit is not revocable at the mere will of either of such parties, nor will the death of either of them abrogate the contract of deposit.

3. A mortgage executed by husband and wife on the lands of the husband, and an accompanying note executed by the same persons, delivered by them, in pursuance of an agreement with the mortgagee and payee, to a third person, to be held by him until the

transmission to him by the mortgagee and payee of the amount of the loan, in the form of a draft to the order of the wife, to be then delivered by him to such mortgagee and payee, are escrows; and, upon the performance by the mortgagee and payee of the stipulated conditions on his part, the depositary is bound to deliver the note and mortgage to him notwithstanding the intervening death of the husband.

4. In the case stated the escrows take effect, by constructive delivery, upon the performance of the stipulated conditions by the mortgagee and payee; and such delivery, by fiction of law, relates back to the delivery made to the depositary in the life-time of the mortgagor and payor, and is substituted to the same.

DOSTER, C. J.: This is an action brought by Charles S. Clark, the defendant in error, against Thomas H. Davis, as administrator of the estate of A. F. Harsh, deceased, and others, to recover on a note, and for the foreclosure of a mortgage securing the same, executed by said A. F. Harsh and wife in his life-time to one William P. Book, and by him assigned and delivered to the defendant in error. Special findings, fully setting forth all the material facts of the case, made by the court, are as follows: "(1) That during the summer of 1888 A. F. Harsh and Lalla C. Harsh applied to William P. Book for a loan of $7,000 on 400 acres of land situate in this county, and during said summer negotiations were had between said parties in reference to such loan. (2) That a short time prior to the 5th day of December, 1888, it was agreed between the parties mentioned in the preceding paragraph that said William P. Book should loan A. F. Harsh and Lalla C. Harsh the sum of $7,000 on 400 acres of land situate in this county, and that a promissory note, on one year's time, should be given by said A. F. Harsh and Lalla C. Harsh to Wm. P. Book, and that said note should be secured by mortgage upon said 400 acres of land, and that after said note and mortgage were executed they should be delivered to Wm. P. Clark, to be held by him until said Book paid to said Clark the $7,000 so borrowed (said money to be paid to Lalla C. Harsh), and that upon such settlement said note and mortgage were to be delivered to said Book. (3) That on the 5th day of December, 1888, said A. F. Harsh and Lalla C. Harsh, his wife, made, executed, and delivered the promissory note and mortgage, copies of which are attached to the petition of plaintiff herein, and placed said note and mortgage in the hands of Wm. M. Clark, in pursuance of the agreement set forth in the last paragraph above. (4) That, soon after said note and mortgage were executed and placed in the hands of said Wm. M. Clark, said Clark notified said Wm. P. Book of their execution and delivery to him. (5) That at the time said note and mortgage were executed, as stated in paragraph 3 of these findings, defendants Harsh and wife were at Pueblo, Colo., and said Harsh and wife were about to start upon a trip through the Southern States for the benefit of Mr. Harsh's health, who was then very ill. (6) That on the 24th day of December, 1888, Mr. Harsh died in Kansas City, Mo., having immediately before returned to that place from his Southern trip. (7) That Lalla C. Harsh (now Lalla C. Collins by marriage) is the daughter of Wm. M. Clark, and said Wm. M. Clark is the brother-in-law of Wm. P. Book. (8) That on the 29th day of December, 1888, W. P. Book, who was then in New York City, obtained a certified check for $7,000, payable to the order of Lalla C. Harsh, and immediately forwarded said check to Wm. M. Clark, who was then living in this county. (9) That upon the receipt of said check by Clark it was indorsed by the payee, Lalla C. Harsh, and by Wm. M. Clark deposited in the First National Bank of Salina, Kansas, and in part payment therefor certificates of deposit were issued,—one for $1,500, and five for $1.000 each, payable to Lalla C. Harsh. (10) That, after the check mentioned in the last paragraph above was received by Clark, he forwarded to said W. P. Book the note and mortgage hereinbefore mentioned. (11) That on the 24th day of July, 1891, said Wm. P. Book assigned, transferred, and delivered to the plaintiff said note and mortgage as collateral security for the payment of a debt due from said Book to said plaintiff. (12) The amount due the plaintiff from said Wm. P. Book is greater than the amount due upon the note for $7,000, upon which this suit was brought. (13) That on the 17th day of January, 1889, from moneys drawn on said certificates, Mrs. Harsh paid to said Book, on said note of $7,000, the sum of $2,000; and on the 11th day of February following she paid him the further sum of $500, which was drawn from the bank on one of said certificates; and since then other small payments on said note have been made. (14) That there is now due upon said note of $7,000 the sum of $5,844.78." From these facts the court concluded, as matter of law: "(1) That the plaintiff is entitled to recover of T. H. Davis, administrator of the estate of A. F. Harsh, deceased, upon the note of $7,000, the sum of $5,844.78. (2) That the plaintiff is entitled to foreclose the mortgage set forth in his petition, to secure the payment of said sum of $5,844.78." To the above findings should be added the further fact, appearing by the pleadings, that the title to the mortgaged lands was in the deceased, Mr. Harsh; and also the further fact, appearing by the evidence, that Mr. Book, the mortgagee, knew of the death of Mr. Harsh before remitting the money on the note and mortgage. Judgments of foreclosure and in denial of a motion for a new trial were rendered, from which the defendants below prosecute error to this court.

The important and difficult question which arises upon these facts is, what effect did the death of A. F. Harsh, the principal mortgagor, occurring as it did before the payment of the money by Mr. Book, the mortgagee, to the intermediary, W. M. Clark, have upon the uncompleted transaction? Upon the part of the plaint-

iffs in error it is contended that W. M. Clark was the agent of A. F. Harsh, merely, and that the death of Mr. Harsh, according to the usual rule in such cases, terminated the agency, leaving him powerless to make that delivery of the instruments in question without which they could have no legal efficacy. It is, without doubt, true that, according to the common law, the death of the principal operates as a revocation of the agency, unless the latter be coupled with an interest. Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. Rep. 189; Clayton v. Merritt, 52 Miss. 353; Lewis v. Kerr, 17 Iowa, 73. But the important, perhaps the determining, question in this case is, whose agent was Mr. W. M. Clark, the custodian of the note and mortgage? The answer to this question involves an examination of the law of escrows. "An escrow is an obligatory writing (usually, but not necessarily, in the form of a deed) delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, and then to be delivered by the depositary to the obligee, when it becomes of full force and effect." 6 Am. & Eng. Enc. Law, 857. This definition, which seems to be collected out of all the authorities, applies fully to the instruments in question in this case. They were delivered by the Harshes to W. M. Clark, in pursuance of an agreement with Mr. Book, to be held by Mr. Clark until the performance of a specified condition by Mr. Book, and then to be delivered to him. Contrary to the view of the plaintiffs in error, the depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor deliver it to the latter without the consent of the former, save upon fulfillment of the agreed conditions. Roberts v. Mullenix, 10 Kan. 22; Grove v. Jennings, 46 Kan. 366, 26 Pac. Rep. 738; Lessee of Shirley v. Ayres, 14 Ohio, 307; Cannon v. Handley, 72 Cal. 133, 13 Pac. Rep. 315. In the case of Roberts v. Mullenix, *supra*, the delivery was made to the grantee without the knowledge of the grantor, and without fulfillment of the condition; but in the case of Grove v. Jennings, *supra*, a redelivery to grantor was made without the authority of the grantee, and without default in the performance of the conditions upon his part. According to these decisions, the depositary of an escrow is not the agent of the depositor, merely; and the agreement of deposit cannot be rescinded by him alone, and the escrow withdrawn at his will. It would seem to follow, then, that the death of the depositor could have no greater effect to terminate the agency of the depositary, and work a recall of the escrow, than could be declared rescission of the contract of bailment by the depositor in his lifetime. We can think of no agreements *inter partes*, terminable by death, which are not equally terminable by the express will of one or the other of such parties before death. It is said, however, that instruments such as those in question can take effect only by delivery; that delivery is the act of the obligor personally, or some one lawfully authorized to represent him; that the obligor, being dead, cannot make the delivery, and no one can make the same for him, because no one can perform an act for a dead person. We do not understand that a manual delivery of an escrow is necessary to invest the obligee with title to the same, or to pass to him the subject of the grant. Our own decisions are to the contrary, and likewise, we think, those of all the courts. "A note placed in escrow takes effect the instant the conditions of the escrow are performed, even though the depositary has not formally delivered it to the payee." Taylor v. Thomas, 13 Kan. 217. The delivery, therefore, is constructively made the moment the conditions requiring the same are performed. The second delivery, whether actual or constructive, operates retroactively, and, by relation back to the first delivery, is substituted to it in time and effect. This doctrine of relation by effect to the first delivery was countenanced by Lord Coke, who said: "If the grantee dies between the first delivery and the deed becoming absolute, the deed is good, for there was delivery begun in the life of the parties; *sed postea consummata existens* by the performance of the condition takes its effect by force of the first delivery, without any new delivery." Perryman's Case, 5 Coke, 84. It is likewise countenanced by all the authorities. Peck v. Goodwin, Kirb. 64; Lessee of Shirley v. Ayres, 14 Ohio, 307; Taft v. Taft, 59 Mich. 186, 26 N. W. Rep. 426; Price v. Railroad Co., 34 Ill. 15; Bostwick v. McEvoy, 62 Cal. 496; Foster v. Mansfield, 3 Metc. (Mass.) 414; Ruggles v. Lawson, 13 Johns. 285; Wallace v. Harris, 32 Mich. 380; Prutsman v. Baker, 30 Wis. 644.

Different reasons for the adoption of this legal fiction are assigned by the courts. By some it is said to be equitable in its nature and intent, and devised to avoid injustice. By others it is said to be for the general purpose of effectuating the intention of the parties; and, in case of deeds in consideration of love or affection, it is resorted to by some courts for the purpose of upholding the transaction as in the nature of a testamentary disposition. Whatever the reasons in support of the doctrine of relation from second to first delivery, there seems to be unanimity in the adjudged cases to the effect that the escrow, for instance, of a *feme sole*, deliverable upon conditions which remain unperformed until after coverture, may nevertheless be delivered upon their performance, notwithstanding the intervening disability; and likewise escrows deliverable upon conditions remaining unperformed at the death of the depositor may also be delivered upon their performance after such death, and that in such cases, by fiction of law, the second delivery is given effect as of the first. Chief Justice Shaw announced and gave authority to the rule in this country in Foster v. Mansfield, *supra*, by saying:

"Whether, when a deed is executed, and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words used, and the purposes expressed, than upon the name which the parties give to the instrument. Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still, it will not take effect as a deed until the second delivery; but, when thus delivered, it will take effect, by relation, from the first delivery. But this distinction is not now very material, because, where the deed is delivered as an escrow, and afterwards, and before the second delivery, the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity." The Supreme Court of California had under consideration a case quite like the present one, in which a mortgage, with the note of the mortgagor and another as his surety, were delivered in escrow to await the clearing up of title to certain lands. Before the performance of the condition, the surety died. The condition was, however, performed, and the estate of the surety, in consequence, held to the discharge of the note; the court, among other things, saying: "When the condition on which an original delivery made in the life-time of a party transpires, the conditional delivery becomes absolute, and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition." Bostwick v. McEvoy, 62 Cal. 499.

Finally, it can be said that the contract of deposit by the deceased, Harsh,—the conditions of the escrow in this case,—were carried out literally and fully, notwithstanding his death, and as they might have been had not his death occurred. It is true, the reason upon the part of the Harshes for making the loan was to procure funds to enable Mr. Harsh to travel in search of health, but with this Mr. Book had neither by law nor equity any concern. His contract was not to furnish the money to Mr. Harsh, but to Mrs. Harsh, the wife. He bound himself to invest her with the possession and legal title to certain funds. He did so. She was then in being, to receive that title and possession. Whatever legal difficulties might exist had the conditions of the escrow required payment to Mr. Harsh, and such payment had been rendered impossible by his death, did not exist under the facts as found by the court. The payment was made to the person to whom Mr. Harsh, in his life-time, directed it should be made. The judgment of the court below is affirmed. All the justices concurring.

NOTE.—*Recent Decisions on Subject of Escrows.*—Where a contract for the exchange of lands was not to be complete until the parties were satisfied as to the title, the deposit of a deed with a third person by one party for delivery to the other "when everything is all right and perfected," does not constitute a delivery in escrow. Miller v. Sears (Cal.), 27 Pac. Rep. 589, 91 Cal. 282. Where defendants, under a contract to sell certain mining lands to plaintiff, delivered a deed thereto to a third person as an escrow, and later delivered a duplicate deed to an agent of plaintiff, which was recorded, it is competent for defendants to show that such deed was intended only as an escrow, and was given to enable plaintiff, by recording it, to apprise subsequent purchasers of its rights in the property. Minah Consolidated Min. Co. v. Briscoe (Cir. Ct.), 47 Fed. Rep. 276. Where the owner of real estate executes a deed to her daughters, from whom she takes back a life lease of the premises, and some months later the owner, with one of her daughters, delivers to a third party a package containing the deed and lease, and inscribed with directions to deliver the same to the owner, and in case of her death to one of the daughters, the leaving of the papers with the depositary did not constitute an escrow; there being no condition to be performed before delivery. Martin v. Flaharty (Mont.), 32 Pac. Rep. 287. Where persons executing deeds to each other leave them in the hands of a third person until they get proper abstracts of title, reserving to themselves the determination of whether the abstracts are proper, they will be held to have been left in escrow, and not delivered, though each party took immediate possession under the deed to him. Hoyt v. McLagan (Iowa), 55 N. W. Rep. 18. Defendant executed a deed naming plaintiff as grantee, and delivered it to M. There was no evidence to show for what purpose such deed was executed, nor was there any agreement between plaintiff and defendant in regard thereto. Held, that a delivery of the deed to plaintiff by M could only constitute either an absolute sale of the land to plaintiff, or a mortgage of it by defendant to plaintiff, for some liability of her own to plaintiff, and that M was not acting within the apparent scope of his authority when he delivered the deed to secure plaintiff for advances made to himself. Hubback v. Ross, 31 Pac. Rep. 353, 96 Cal. 426. Where a mortgage, perfect on its face, and bearing no evidence that the mortgagor's wife is to join in it, has been delivered by the mortgagor to the mortgagee, parol evidence is not admissible to show that it was delivered as an escrow, to become operative only on condition that the mortgagor's wife should join in it, since a deed can never be an escrow if delivered to the grantee himself. East Texas Fire Ins. Co. v. Clarke (Tex. Civ. App.), 21 S. W. Rep. 277, 1 Tex. Civ. App. 238. A deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow. Hubbard v. Greeley, 24 Atl. Rep. 799, 84 Me. 340. A written instrument can only become an escrow when it is placed in the hands of a person not a party to it, and the delivery of a promissory note into the hands of one of several joint makers, by the others, on any agreement or understanding between the selves with reference to its delivery, does not impart to it the legal qualities of an escrow. Carter v. Moulton (Kan.), 32 Pac. Rep. 633. Where

plaintiff made a deed for land, and by an agreement with defendant that he would accept the deed, and pay a certain consideration therefor, if the title were satisfactory, placed it in a bank, with instructions to deliver it to defendant "upon receipt of the contract price," there was no delivery and acceptance, and until the conditions were performed the sale of the land was not complete, and plaintiff could not recover the price. Helm v. Kleinschmidt, 31 Pac. Rep. 542, 12 Mont. 586. Where the delivery of a deed to a buyer's agent is absolute, the buyer cannot make it an escrow by requesting the agent to hold it until the price is paid. Parrish v. Steadham (Ala.), 15 South. Rep. 354. Where a deed of land to a car company, in consideration that it construct its car shops thereon, is executed to enable the grantee to secure the bonds, which it proposes to negotiate, and is delivered by the grantor to the trustee of the bonds on condition that it is not to take effect unless the bonds are negotiated, it is an escrow, and the fact that the trustee recorded the deed does not constitute a delivery, the bonds not being in fact negotiated. Beaumont Car Works v. Beaumont Imp. Co., 23 S. W. Rep. 274. Plaintiff signed an application for fire insurance, and delivered it to the agent of the insurance company, to be held by him until he could get the consent of another insurance company that had an outstanding policy upon the same property. The agent, in violation of plaintiff's instructions, delivered the application to the company without obtaining such consent, and the company issued a policy, which the plaintiff refused to receive. Held, that the policy issued on such application was void, since the delivery of the application to the agent was merely in escrow. Price v. Home Ins. Co., 54 Mo. App. 119. A deed may be delivered to the attorney of the grantee, in escrow, the delivery being accompanied by a writing explaining the condition on which delivery to the grantee depends. Ashford v. Prewitt (Ala.), 14 South. Rep. 663. A deed cannot be delivered in escrow to the agent or attorney of the grantor, nor to the agent or attorney of the grantee. Day v. Lacasse, 27 Atl. Rep. 124, 85 Me. 242. On an issue as to whether a deed deposited by plaintiff with another as an escrow was delivered by the latter without plaintiff's consent, and without regard to the conditions of the deposit, such depositary testified that he had authority from plaintiff for delivering the deed, which plaintiff denied. A witness, to whom the property covered by the deed was sold by the grantee therein, testified that he informed plaintiff of his purchase, and that plaintiff claimed no interest in the property, but went with him to an insurance agent to have the policies transferred to the witness. Held, that a finding that plaintiff authorized the delivery of the deed would not be disturbed. Eggleston v. Pollock (Neb.), 56 N. W. Rep. 805. The delivery of a deed by one with whom it is left in escrow to hold till the happening of a certain condition is ineffectual to pass title, when such delivery is made without the performance of the condition. Burnap v. Sharpsteen (Ill. Sup.), 36 N. E. Rep. 1008. When a deed placed in escrow, to be delivered when the grantee has paid certain liens on the land conveyed, is, after the grantor's death, obtained by the grantee, without payment of the liens, and by him recorded, the grantee's title is voidable by proof of the facts rebutting the presumption of delivery, but not void. Landon v. Brown, 27 Atl. Rep. 921, 160 Pa. St. 538. Where a mortgage is deposited in escrow to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery thereof by the custodian to the mortgagee without the knowledge of the mortgagor, before the fulfillment of the conditions, will not confer any interest on the mortgagee or on an assignee without notice. Roberson v. Reiter (Neb.), 56 N. W. Rep. 877. Defendant executed two notes to plaintiff, in payment for certain shares of stock, and the notes and stock were deposited with a third person, under a written agreement whereby the notes were not to be delivered to payee until matured, nor stock delivered to purchaser until paid for. Held, such deposit of the notes was not a delivery in escrow. Glenn v. Hill (Wash.), 40 Pac. Rep. 141. In an action by tenants in common to enforce a contract for the sale of land, they tendered to defendant a deed properly executed and acknowledged by all of them. On defendant's refusal to accept the deed, it was, by order of the court, deposited with the clerk. Held, that the deed had been delivered in escrow, and was therefore not affected by the death of one of the grantors prior to decision of the case. Webster v. Kings County Trust Co. (Sup.), 30 N. Y. S. 357, 80 Hun, 420. The delivery of a contract signed and placed in escrow, without fulfillment of the conditions of the escrow, is void. Davis v. Kneale (Mich.), 61 N. W. Rep. 508. Neither a mortgagor nor a purchaser with notice can acquire any benefit by the recording of a release of a mortgage by a person to whom it was intrusted for delivery only on payment of the debt by the mortgagor, which condition was not fulfilled. Whipple v. Fowler, 60 N. W. Rep. 15, 41 Neb. 675. A deed delivered in escrow that is fraudulently abstracted from the depositary by the grantee without performing the conditions on which it was to be delivered to him is void even in the hands of a *bona fide* purchaser of the land. Jackson v. Lynn (Iowa), 62 N. W. Rep. 704. The grantor in a deed delivered in escrow under a contract that it shall not be delivered to the grantee until the discharge by the latter of certain incumbrances on other lands conveyed to the grantor in exchange does not, by recording the deed to him, and occupying the the lands, ratifying the grantor's wrongful act, in surreptitiously abstracting the deed to him from the depositary, where the grantor was entitled under the contract to take immediate possession of the lands taken in exchange. Jackson v. Lynn (Iowa), 62 N. W. Rep. 704. Delivery of a deed to the grantee, though purporting to be in escrow, is an absolute delivery thereof. Baker v. Baker (Ill. Sup.), 42 N. E. Rep. 867, 159 Ill. 394. A chattel mortgage executed to secure notes given by the mortgagor, pursuant to a demand by the mortgagee for security, was delivered to the attorney of the mortgagee, and on the same day it was sent to the mortgagee, and a copy was immediately filed in the register's office. The mortgagee retained the original until after the destruction of the mortgaged chattels by fire, when he made a demand for the insurance money. Held, that there was a complete delivery of the mortgage, and not a delivery in escrow. Adler v. Germania Fire Ins. Co. (Sup.), 39 N. Y. S. 1070, 17 Misc. Rep. 347. Defendant listed mining property with an agent, who negotiated a sale to a corporation to be formed, of which such agent was to be a member. L, one of the proposed incorporators, paid defendant half of the purchase price, the balance to be secured by mortgage due in one year. Defendant executed a deed to L, and sent it to the agent, with instructions to deliver it when the mortgage was given. After several months, the mortgage not having been given, defendant rescinded the sale. Held, that the delivery of the deed to the agent was a delivery in escrow only. Tyler v. Cate (Oreg.), 45 Pac. Rep. 800. The deposit of a deed

in escrow does not constitute a delivery, until performance of condition of the escrow; and the title remains meantime in the grantor, and subject to claims against him. Wolcott v. Johns (Colo. App.), 44 Pac. Rep. 675. While a deed is in escrow, awaiting the performance of a condition precedent to delivery by the vendor, neither the rights of the parties, nor of a creditor of the vendor, are affected by the possession of the property by the purchaser, taken with the assent of the vendor. Wolcott v. Johns (Colo. App.), 44 Pac. Rep. 675.

CORRESPONDENCE.

ANSWERS IN INSURANCE SUITS.

To the Editor of the Central Law Journal:

I have just read, with interest, Mr. Merrill's article in a recent number of the JOURNAL, upon the subject of answers in insurance suits, and I will call attention to one matter in connection with this subject that is of considerable importance to members of the profession. In construing the effect of a clause in an insurance policy restricting the right to bring suit for a period of sixty days after due proof of loss, or after award by appraisers, it is well known that the courts have held that a denial of all liability on the policy based on other grounds and declared previous to bringing of suit, is a waiver of this limitation. Hand v. Ins. Co., 57 Minn. 519; Ætna Ins. Co. v. McGuire, 51 Ill. 342; Cobb v. Ins. Co., 11 Kan. 93; Cal. Ins. Co. v. Gracey, 15 Colorado, 73. But it was also held in Home Ins. Co. v. Fallon (Neb.), 63 N. W. Rep. 860, that a denial of liability contained in the answer based on the claim that no contract of insurance was in force, is also a waiver of such limitation. In a case recently before the supreme court in this State, the question was raised as to whether any denial of liability based on other grounds and declared for the first time in the answer, would constitute such waiver, and the question was determined in the negative. This was the case of LaPlant v. Fireman's Ins. Co., and will be reported in the 70th N. W. Rep., and a plain distinction is made as to the effect of the denial of liability made before suit and one contained in the answer; that the first is voluntary, and that the latter is not, and that, therefore, while a denial of liability before bringing suit may and does constitute a waiver of the limitations as to the time in which suit may be brought, that a similar denial of liability contained in an answer to a complaint prematurely served, will not constitute such waiver.

Minneapolis, Minn. F. V. BROWN.

BOOK REVIEWS.

BOISOT ON MECHANICS' LIENS.

This appears to be a very satisfactory treatise upon a difficult and complicated subject, and one which is constantly growing in interest and practical importance. The work is divided into four parts. Part I, treats of the nature and creation of mechanics' liens. Part II, of mechanics' liens considered with reference to their subject-matter and right protected and property affected. Part III, mechanics' liens considered with reference to the parties affected by them. Part IV, the enforcement and discharge of mechanics' liens. Part V, mechanics' liens in personal property. Within these main heads are chapters in which the subjects are carefully treated in detail. The work is one of the Hornbook Series, contains nearly one thousand pages and is published by West Publishing Co., St. Paul.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT STATED — Pleading.—From an account stated the law implies a promise to pay the balance thus acknowledged to be due, and an express promise need not be alleged.—VOIGT v. BROOKS, Mont., 48 Pac. Rep. 549.

2. ADVERSE POSSESSION.—Where a church corporation, organized in 1832, by its articles of incorporation filed, asserted title in the corporation to certain real estate then held by trustees, and ever since said time has continued in the uninterrupted possession and use of the property under such claim, its title thereto is marketable.—ROTHER v. TRUSTEES OF SHARP ST. STATION, ETC., Md., 37 Atl. Rep. 24.

3. ADVERSE POSSESSION—Highways.—An allegation that plaintiff and those under whom she claims have had, for over 20 years, "the uninterrupted, exclusive, and adverse use and enjoyment" of a part of the street which defendant city had condemned without awarding compensation for the fee, is insufficient to establish plaintiff's title, since it fails to show any privity between her and her predecessors, or that the street had not been dedicated to public use before their possession began.—MAYOR, ETC. OF CITY OF BALTIMORE v. COATES, Md., 37 Atl. Rep. 18.

4. APPEAL—Bond.—An appeal bond in an action in which an attachment has been levied operates as security only for the costs of appeal, where there has been no impairment of the security by waste of the property, and no burdens accruing upon it by nonpayment of taxes.—DEXTER, HORTON & CO. v. SAYWARD, U. S. C. C., D. (Wash.), 79 Fed. Rep. 237.

5. APPEAL—Correcting Record.—Pending an appeal, either party may, on notice to the adverse party, move the trial court to correct the record so as to conform to the minutes, and, if the motion be granted, bring up the corrected record to the appellate tribunal by *certiorari*.—LAKE ERIE & W. R. CO. v. BATES, Ind., 46 N. E. Rep. 831.

6. APPEAL BY COUNTY—Bond.—Code Civ. Proc. § 1058, declaring that in a civil action no appeal bond can be required of the State or any officer thereof who is a party in his official capacity, "or of any county," etc.,

without mentioning county officers, applies to an appeal by a county auditor where the county is the real party in interest.—LAMBERSON v. JEFFERDS, Cal., 48 Pac. Rep. 485.

7. ATTACHMENT — Levy—Priorities.—It is the duty of the sheriff to levy orders of attachment upon the debtor's property in the order in which he receives them, and, if a levy under a junior order is first made, it will not have preference over a senior order, but the levy will inure to the benefit of the creditors whose orders were first placed in the officer's hands.—ATCHISON, ETC. R. CO. v. SCHWARZSCHILD & SULZBERGER CO., Kan., 48 Pac. Rep. 591.

8. ATTORNEY AND CLIENT—Liability for Negligence.—Though an attorney is acting for the borrower in the matter of a loan, and is to receive all his compensation from him, he may be the attorney of the lender, so as to be liable to him for negligence in failing to discover liens on the property on which security was to be given; the lender having told him to search the records therefor, and he having said he would.—LAWALL v. GROMAN, Penn., 37 Atl. Rep. 98.

9. ATTORNEY IN FACT — Powers.—A general power of attorney for sale of corporate stock does not authorize the attorney in fact to sell the stock in payment of his own debts, or the purchaser of the stock to so apply it; and it is immaterial that the principal is the wife of the attorney.—WILSON v. WILSON-ROGERS, Penn., 37 Atl. Rep. 117.

10. BANKS AND BANKING—Bills and Notes.—A bank which has not received a certificate from the bank commissioner authorizing it to transact business may negotiate promissory notes, so as to bind itself, and pass a valid title thereto.—KELLOGG v. DOUGLAS COUNTY BANK, Kan., 48 Pac. Rep. 587.

11. BANKS AND BANKING — Deposits.—It is within the power of a bank in which a deposit of money has been made or otherwise provided to hold the same, and pay the money out upon the happening of a certain contingency agreed upon by the interested parties; and, where such an arrangement is made, a deposit, slip or receipt issued by the cashier of the bank in the usual and ordinary course of business is *prima facie* evidence of the liability of the bank.—AMERICAN NAT. BANK OF ARKANSAS CITY v. PRESNALL, Kan., 48 Pac. Rep. 556.

12. BANKS AND BANKING—Lien on Stock.—The lien given by a bank charter on the shares of its stockholders to secure any indebtedness by them to the bank extends only to indebtedness directly incurred to the bank, not to indebtedness to third persons acquired by it.—BOYD v. REDD, N. Car., 27 S. E. Rep. 35.

13. BILLS AND NOTES—Non-negotiable Note.—Where a note, otherwise negotiable in form, contains the following clause: "In case of the breach of any of the covenants or conditions in the mortgage deed securing this bond contained, to which said deed reference is hereby made, and which is made a part of this contract, in either such case the said principal sum with all accrued interest shall, at the election of the legal holder or holders hereof, at once become due and payable without further notice, and may be demanded and collected, anything herein contained to the contrary notwithstanding," held, that this clause renders the note a non-negotiable instrument.—CHAPMAN v. STEINER, Kan., 48 Pac. Rep. 607.

14. BILLS AND NOTES—Promissory Note—Defenses.—Stockholders of a corporation, who, to raise money for its use, execute their individual note, which is accepted on the faith of their personal liability, cannot be considered as accommodation makers, or plead want of consideration.—REED v. FIRST NAT. BANK OF PUEBLO, Colo., 48 Pac. Rep. 507.

15. CONSTITUTIONAL LAW — Police Power of State.—Legislation having for its object the protection of laborers from oppression and fraud, by prohibiting the issuance by employers, in payment of wages, of scrip or orders redeemable in goods at exorbitant prices, may properly be enacted under the police powers of the State.—IN RE HOUSE BILL NO. 147, Colo., 48 Pac. Rep. 512.

16. CONSTITUTIONAL LAW — Railroads — Preferred Debts.—A State statute providing that citizens of the State shall have a lien on the personal property of railroad companies thereafter organized, to the amount of $100, for all debts originally contracted in the State, superior to all other liens or mortgages (2 Burns' Rev. St. Ind. 1894, § 5179; Rev. St. Ind. 1881, § 3919), is valid both as against the railroad company and other lienholders.—BROWN v. OHIO VAL. RY. CO., U. S. C. C., D. (Ind.), 79 Fed. Rep. 176.

17. CONTRACT — Construction.—Where a contract is ambiguous, the court will adopt the practical construction put upon it by the parties.—CHILDERS v. FIRST NAT. BANK OF JEFFERSONVILLE, Ind., 46 N. E. Rep. 825.

18. CORPORATION — Contract Made by Foreign Corporation.—A contract made by the agent of a foreign corporation in the State of Indiana is valid, although the agent may not have complied with sections 3453, 3454, 2 Burns' Rev. St. Ind. 1894, requiring the agents of foreign corporations to do certain things before entering upon the duties of their agency in the State, as the only inhibition of the statute is that the contract shall not be enforced in the courts of the State before compliance with these sections.—SULLIVAN v. BECK, U. S. C. C., D. (Ind.), 79 Fed. Rep. 200.

19. CORPORATION—Election of Directors.—A director of a corporation has no standing as a stockholder to question the title of the other directors to their offices because of informalities in their election, when he participated in all the proceedings, and has acted as a director under an election equally informal.—HALL v. WEST CHESTER PUB. CO., Penn., 37 Atl. Rep. 106.

20. CORPORATION—Insolvent Corporations—Subscriptions.—A stockholder who is also a creditor of a corporation has no right to set off the debt of the corporation to him as against his unpaid subscription, after the corporation has become insolvent, and a suit in equity has been brought to wind up its affairs and distribute its assets, even though such debt arises upon an accommodation note given by him to the corporation because of his subscription, and to avoid an assessment on his stock.—BAUSMAN v. KINNEAR, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 172.

21. CORPORATIONS — Officers — Fraud.—Where a corporation was organized for the sole purpose of acquiring title to, and improving and selling, a certain tract of land, a representation made by its president, for the purpose of securing a subscription, to the effect that the land cost the company a certain sum, was not a mere expression of opinion of the value of the property, which the proposed subscriber might not rely upon without investigation.—ZANG v. ADAMS, Colo., 48 Pac. Rep. 509.

22. CORPORATIONS — Ultra Vires.—A purchase by a corporation organized to deal in hardware of an account secured by lien, against a mining company, for services and goods sold, is not *ultra vires*, where made in good faith, to protect its own interest as creditor of the mining company.—MAHONEY v. BUTTE HARDWARE CO., Mont., 48 Pac. Rep. 545.

23. CRIMINAL EVIDENCE—Larceny—Conspiracy.—Under 1 Hill's Ann. Laws, § 706, subd. 6, providing that "after proof of a conspiracy the declaration or act of a conspirator against his coconspirator, and relating to the conspiracy," may be given in evidence, the sufficiency of the proof of conspiracy to render such evidence admissible is largely discretionary with the trial court; and its action in admitting such evidence will not be disturbed on appeal, where there was evidence *prima facie* tending to prove the existence of a conspiracy, or from which it might be reasonably inferred.—STATE v. MOORE, Oreg., 48 Pac. Rep. 468.

24. CRIMINAL LAW—Appeal.—A bill of exceptions is not properly in the record unless it affirmatively appears that it was filed in the clerk's office after being signed by the judge, as required by Rev. St. 1894, § 641.—WALBERT v. STATE, Ind., 46 N. E. Rep. 827.

25. CRIMINAL LAW—Burglary.—Under Cr. Code, § 86, which defines the crime of burglary, without regard to whether the act is committed in the day or the night time, and fixes the punishment at imprisonment in the penitentiary for not less than 1 nor more than twenty years, and which contains a proviso that where the same offense is committed in a dwelling house in the night time, it shall be punished by imprisonment for not less than 5 nor more than 20 years, a conviction may be had on an indictment for burglarizing a dwelling house which does not state whether committed in the day or night time, though the evidence shows it to have been committed in the night, the time of the commission of the act being, under the statute, but an aggravation of the offense.—SCHWABACHER V. PEOPLE, Ill., 46 N. E. Rep. 809.

26. CRIMINAL LAW—Demurrer to Indictment.—Under Pen. Code, §§ 1008, 1009, providing that the allowance of a demurrer to an information is a bar to another prosecution, and that defendant must be discharged unless the court "directs" a new information to be filed, a mere permissive order, sustaining a demurrer, "with leave" to file a new information, entitles defendant to a discharge.—EX PARTE WILLIAMS, Cal., 48 Pac. Rep. 499.

27. CRIMINAL LAW—Extradition.—Where a person is charged with the commission of an offense against two separate States or territories, and is apprehended in one of them, and the laws of such State or territory have been put in force against him, it has exclusive jurisdiction of the prisoner until the demands of its laws are satisfied. If, however, the governor of such State honors a requisition for the prisoner made upon him by the governor of the other State, and surrenders him to the demanding State, it will operate as a waiver of the jurisdiction of the asylum State.—HESS V. GRIMES, Kan., 48 Pac. Rep. 596.

28. CRIMINAL LAW—Homicide—Insanity.—Where insanity is set up as a defense to an indictment for murder, unless it appears that the prisoner was not conscious, at the time of the killing, that the act which he was doing was morally wrong, he is responsible, even if it be shown that he was impelled to its commission by an impulse which he was unable to resist.—GENZ V. STATE, N. J., 37 Atl. Rep. 69.

29. CRIMINAL LAW—Nolle Prosequi—Power of District Attorney.—In the absence of a statute changing the rule of the common law, a district attorney has the power to enter a *nolle prosequi* in a criminal case without the consent of the court.—PEOPLE V. DISTRICT COURT OF LAKE COUNTY, Colo., 48 Pac. Rep. 500.

30. CRIMINAL LAW—Statute—Constitutionality.—Gen. St. § 1630, providing that "the court shall State its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict," does not authorize, in a prosecution based on a statute, a charge for the jury "to consider the legal questions regarding the constitutionality of the statute in question; and, if they conscientiously believe that the statute is unconstitutional upon any of the grounds claimed, then they should acquit the defendant."—STATE V. MAIN, Conn., 37 Atl. Rep. 80.

31. CRIMINAL LAW—Witnesses—Indorsement on Indictment.—Defendant in a criminal case waives his right to time to meet the evidence of witnesses whose names are not on the list furnished with the indictment, where he has notice that such witnesses are to be produced, and he does not ask for such time, or object to their evidence, until they have been sworn and examined.—ASKEW V. PEOPLE, Colo., 48 Pac. Rep. 524.

32. CRIMINAL PRACTICE — Homicide—Bill of Exceptions.—A bill of exceptions in a capital case, presented and signed after the trial term, cannot be considered as part of the record, unless the time for signing it was extended beyond the term by an order of court, and such an order is not one which it is the duty of the court to enter as a matter of right to the defendant.—DAVIS V. PEOPLE, Colo., 48 Pac. Rep. 513.

33. CRIMINAL TRIAL—Homicide—Impeachment of Witness.—It is error to permit the State to introduce evidence of previous statements made by a witness for defendant that deceased, with whose murder defendant was charged, had money on his person, for the purpose of impeaching the witness, when the witness did not testify as to such matter on direct-examination, but the testimony sought to be contradicted was new matter elicited on cross-examination.—KOHL V. STATE, N. J., 37 Atl. Rep. 73.

34. CRIMINAL TRIAL.—A verdict in a homicide case rendered at a regular term of court may be received in the absence of defendant's counsel if defendant himself is present.—HOMMER V. STATE, Md., 37 S. W. Rep. 26.

35. CUSTOM.—When a bank has long been in the habit of rediscounting its bills receivable in large amounts, all other banks in the same locality pursuing the same practice, and the president and cashier of such bank propose to its regular correspondent a rediscount of its bills, and there are no circumstances attending such proposal to arouse suspicion, the bank to which it is made may safely act upon it, without further inquiry, on the assumption that the act has either been specially authorized, or that the officers are acting within the purview of their general powers.—UNITED STATES NAT. BANK V. FIRST NAT. BANK OF LITTLE ROCK, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 296.

36. DEATH—Presumption from Absence.—Where a husband leaves his home in Pennsylvania, and becomes domiciled at a known place in a foreign country, mere failure to hear from him at his former domicile for seven years raises no legal presumption of his death.—FRANCIS V. FRANCIS, Penn., 37 S. W. Rep. 120.

37. DEDICATION—Filing of Plat.—Where, by an agreement duly executed and recorded, the owner of land has agreed to sell an interest in it, the subsequent filing of a plat by the vendor alone, on which such land is shown as a public square, will not operate as a dedication of it to public use.—SOUTH BALTIMORE HARBOR & IMPROVEMENT CO. OF ANNE ARUNDEL COUNTY V. SMITH, Md., 37 Atl. Rep. 27.

38. DEEDS—Necessity of Revenue Stamp.—The absence from a deed of a revenue stamp required by Act Cong. July 13, 1866, does not render it void, but merely voidable on proof that it was omitted with intent to evade the revenue tax.—THOWBRIDGE V. ADDOMS, Colo., 48 Pac. Rep. 535.

39. DESCENT AND DISTRIBUTION—Designating Heir at Law.—In giving effect to the act of April 29, 1854 (section 4182, Rev. St.), which provides for the filing of a declaration appointing one to stand as heir at law to the declarant in the event of his death, and for the making of an entry upon the journal by the judge, and a record of the proceedings, it is not essential that the declaration be made in open court, nor that it be made in any particular place. Such declaration may be made before a judge of the probate court within his county at a place other than the office of said court.—BIRD V. YOUNG, Ohio, 46 N. E. Rep. 819.

40. DIVORCE—Desertion.—It is no bar to the wife's suit for divorce by reason of desertion by the husband for the statutory period, that she in fact during that period did not desire her husband to return, and felt unwilling to live with him, provided such state of feeling on her part was the result of her husband's misconduct, involving cruel treatment of her.—SMITH V. SMITH, N. J., 37 Atl. Rep. 49.

41. ELECTIONS—Ballots.—There can be no election to an office, the name or title of which is not designated on the official ticket, by voters putting on the ballot stickers bearing the title of the office and the name of the candidate; the only provision for addition to the ballot being the insertion of names in blank spaces under the titles of offices thereon.—IN RE CONTESTED ELECTION OF LAWLOR, Penn., 37 Atl. Rep. 92.

42. EMINENT DOMAIN — Property Already in Public Use.—Hill's Ann. Laws, § 4061 *et seq.*, prescribing the method of locating county roads, do not authorize a county to locate a road over land previously appropriated for a toll road, which can only be reacquired in the manner prescribed by sections 3255-3256, by first paying to the toll company the cost of constructing and repairing the road, etc., after deducting the profits received by said company.—LITTLE NESTUCCA TOLL. ROAD CO. v. TILLAMOOK COUNTY, Oreg., 48 Pac. Rep. 465.

43. EQUITY—Adequate Remedy at Law.—A bill for specific performance of a contract to sell land, for removal of a cloud on title, and to prevent the fraudulent use of legal process for the accomplishment of a collusive and illegal purpose, need not aver inadequate remedy at law, even in the absence of the equity rules, which dispense with formal averments.—BORIE v. SATTERTHWAITE, Penn., 37 Atl. Rep. 102.

44. EQUITY — Estates.—It is an established rule of equity practice that estates limited over to persons not *in esse* are represented by the living owner of the first estate of inheritance.—DOREMUS v. DUNHAM, N. J., 37 Atl. Rep. 62.

45. EQUITY—Laches.—A bill in the nature of an action of deceit, based on fraudulent representations, whereby plaintiff was induced to discount a note of a corporation cannot be maintained where brought more than six years after maturity and non-payment of the note, at which time plaintiff was informed of the main fact on which its bill is based, and put on inquiry as to everything material thereto.—BRADDOCK TRUST CO. v. GUARANTEE, ETC. CO. OF PHILADELPHIA, Penn., 37 Atl. Rep. 101.

46. EVIDENCE.—A copy of a copy of a letter is not admissible in evidence.—CAREY v. FULMER, Miss., 21 South. Rep. 752.

47. FEDERAL COURTS—Habeas Corpus.—Where it appears plainly as matter of law, on the facts alleged, that issuance of the writ would be an unwarranted interference by the federal court with the execution of the State laws, the court will not issue the writ. And, before issuing a writ to interfere with the execution of State laws, the court should properly inquire into the facts, or require them to be set forth in the application, so that the court can see that there is a proper case to be investigated in this manner.—IN RE KRUG, U. S. C. C., D. (Wash.), 79 Fed. Rep. 309.

48. FEDERAL COURTS — Habeas Corpus — Insane Persons.—It is within the province of the State legislatures to determine the method of procedure for procuring the confinement of insane persons, and, if the steps provided have not been followed, the redress of persons improperly confined is by application to the State courts. The federal courts ought not, except in extreme cases, if at all, to interfere with the administration of such State laws by the issue of the writ of *habeas corpus* on the ground that an alleged insane person is restrained of his liberty in violation of the constitution of the United States.—IN RE HUSE, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 305.

49. FEDERAL COURTS — Jurisdiction — Foreclosure.—A federal court having possession, through its receiver, of the mortgaged property, has jurisdiction of a suit to foreclose the mortgage, regardless of the citizenship of the parties.—FISH v. OGDENSBURGH & L. C. R. Co., U. S. C. C., N. D. (N. Y.), 79 Fed. Rep. 131.

50. FEDERAL COURTS—Jurisdiction of Supreme Court.—To sustain the jurisdiction of the supreme court on the ground that a right under the constitution was denied by the State courts, it must appear from the record that plaintiff in error specially set up or claimed the protection of some clause of the federal constitution; and it is not sufficient that such a claim was made merely in the briefs and oral arguments in the State supreme court. — ZADIG v. BALDWIN, U. S. S. C., 17 S. C. Rep. 639.

51. FEDERAL COURTS — Witness Fees. — Witness fees and mileage of officers of a corporation which is a party will be taxed as costs in the federal courts, where such is the practice of the State courts, and there is no settled practice relative thereto in the federal courts of the district. — NEAD v. MILLERSBURG HOME WATER CO., U. S. C. C., E. D. (Penn.), 79 Fed. Rep. 129.

52. FRAUDS, STATUTE OF — Contracts — Estoppel. — A contract entered into between a person desiring to purchase land and one who claims ownership of the same, which recites that title to such land is in a third person, and in which contract such claimant does not assume to act as agent for such third person, but agrees only to procure from him a deed to such land, is not, under the statute of frauds, a contract of sale by such third person, even though he knew of and assented to the making of the same. — DEIDERICK v. ALEXANDER, Kan., 48 Pac. Rep. 594.

53. FRAUDULENT CONVEYANCES—Intent.—In an action to vacate a sale as in fraud of creditors, plaintiff must prove a fraudulent intent, where no presumption of fraud is raised by any relation between the parties to the sale.—WACHOVIA LOAN & TRUST CO. v. FORBES, N. Car., 27 S. E. Rep. 43.

54. GAME LAW—Unlawful Possession. — Code, art. 99, § 13, as amended by Acts 1894, ch. 404, providing that "no person shall shoot or in any manner catch, kill or have in his possession," any rabbit between dates named, does not prohibit possession between such dates of rabbits lawfully killed in another State.—DICKHAUT v. STATE, Md., 37 Atl. Rep. 21.

55. GUARDIAN AD LITEM — Collateral Attack upon Judgment.—A decree of a federal court subjecting the real estate of a non-resident infant cannot be collaterally attacked as void upon the ground that the infant was before the court only by the appointment of a guardian *ad litem*.—MANSON v. DUNCANSON, U. S. S. C., 17 S. C. Rep. 647.

56. HABEAS CORPUS—Defective Verdict.—That a verdict of "guilty" under an indictment for murder does not specify the degree of murder, so as to enable the court to fix the proper punishment, does not render a sentence thereunder void, but it is erroneous merely, and not reviewable on *habeas corpus*.—IN RE ECKART, U. S. S. C., 17 S. C. Rep. 688.

57. INJUNCTION. — A preliminary mandatory injunction restraining defendants, who had been in undisturbed possession of a church for years, as pastor and trustees, from interfering with the property, and putting complainants, who claimed to be the pastor and trustees, in control, was improvidently granted without other evidence than an *ex parte* affidavit, and a part of the bill, sworn to as an injunction affidavit, the facts in which were met and denied by the answer.—FREDERICKS v. HUBER, Penn., 37 Atl. Rep. 90.

58. INSURANCE—Foreign Companies—Statutes.—Gen. Laws 1864, p. 745, requiring foreign insurance companies doing insurance in the State to deposit certain bonds as security for persons doing business with them, and to appoint a resident agent, was impliedly repealed by Laws 1887, p. 118, prescribing in detail the terms and conditions on which foreign insurance companies might do business in the State, and providing that no company complying therewith should be excluded. — CONTINENTAL INS. CO. OF NEW YORK v. RIGGEN, Oreg., 48 Pac. Rep. 476.

59. INSURANCE — Loss.—One to whom a policy was issued without his knowledge, and who did not intend to accept it when it was issued, cannot accept it after a loss, and therefore the filing of proofs of loss on such a policy is not an acceptance, and does not violate a condition of a previously issued policy against additional insurance. — NELSON v. ATLANTA HOME INS. CO., N. Car., 27 S. E. Rep. 38.

60. INSURANCE — Misrepresentations in Application. —When an applicant for insurance has told the solicit-

ing agent of the insurance company the facts in relation to an incumbrance on the property it is proposed to insure, and the agent, asserting that such facts are not material, has inserted in the application which is signed by the applicant a statement that there is no incumbrance on the property, but there is nothing to show that the company would have declined the risk if it had known of the incumbrance, nor that either the insured or the agent perpetrated any fraud on the company, the insurance company, in case of a loss, is liable upon a policy issued upon such application, notwithstanding it contains a stipulation that any false answer in the application should render it void.—PHOENIX INS. CO. V. WARTTEMBERG, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 245.

61. INSURANCE—Proof of Amount of Loss.—Where the books showing the amount of goods in a mercantile house when destroyed by fire were also burned, evidence showing the amount of stock on hand when an inventory was taken, the quantity purchased afterwards and before the fire, the amount of sales made, and the average profits charged thereon, is admissible to prove theamount of the loss.—SCOTTISH UNION & NATIONAL INS. CO. OF EDINBURGH, SCOTLAND, V. KEENE, Md., 37 Atl. Rep. 88.

62. JUDICIAL SALE—Setting Aside.—Where property owned by minors was bid off at a foreclosure sale for the amount of the incumbrance and costs, under a verbal agreement between the purchaser and the guardian of the minors (which was afterwards reduced to writing) that the purchaser should pay a higher price for the property, the remainder to be paid to the guardian before the time for redemption from the sale expired, an assignee of the certificate of sale took it charged with the equities arising from such agreement, though he had no actual knowledge of it; and, though the agreement cannot be enforced against him, unless the price agreed on is paid, the sale will be set aside at suit of the guardian, and a resale ordered.—BRUSCHKE V. WRIGHT, Ill., 46 N. E. Rep. 813.

63. JUDGMENT — Default.—A rule to open a judgment entered on bond and warrant of attorney, and to allow defendant to answer, was improperly discharged where defendant, corroborated by two other witnesses, testified to an agreement which, if made, entitled him to a credit on the judgment, and plaintiff's denial of said agreement was unsupported by other testimony. —HEIMGAERTNER V. STEWART, Penn., 37 Atl. Rep. 93.

64. JUDGMENT—Effect as Adjudication. — Where a defendant pleaded as a counterclaim one-half of the amount of a payment made by him on a note which he alleged was given for the joint benefit of himself and plaintiff, and issue joined on such allegation was determined in his favor, and judgment rendered for his counterclaim, such judgment constitutes an adjudication, as between the parties, that each is liable for one-half the note, and estops the plaintiff from denying his liability in an action to recover on account of a subsequent payment made by defendant thereon.—REED V. CROSS, Cal., 48 Pac. Rep. 491.

65. JUDGMENT—Res Judicata. — In *mandamus* to compel county commissioners to levy a tax to pay judgments rendered on county warrants, defenses predicated on the invalidity of such warrants are not available.—BOARD OF COM'RS OF RIO GRANDE COUNTY V. BURPEE, Colo., 48 Pac. Rep. 539.

66. JUDGMENTS — Vacation — Res Judicata.—A judgment entered in violation of an agreement to extend the time to answer is taken through defendant's "surprise or excusable neglect," within Hill's Ann. Laws, § 102, authorizing the court, in its discretion, to relieve a party from such judgments; and hence denial of an application under the statute to vacate the judgment bars a suit in equity for the same relief.—THOMPSON V. CONNELL, Oreg., 48 Pac. Rep. 467.

67. JUDGMENT — Validity. — A judgment which is entirely outside of the issues in the case, and upon a matter not submitted to the court for its determination, is a nullity, and may be vacated and set aside at any time upon motion of the defendant.—GILLE V. EMMONS, Kan., 48 Pac. Rep. 569.

68. JUDGMENT BY DEFAULT — Injunction.—An injunction against the enforcement of a judgment by default should not be granted to allow defendant a set-off or diminution of the damages allowed in the action, on grounds which could have been raised therein, if it is not shown that the judgment plaintiff is insolvent, and no sufficient reason appears why a defense was not made.—TWIGG V. HOPKINS, Md., 37 Atl. Rep. 24.

69. LIBEL—Evidence—Mitigation of Damages.—In an action for newspaper libel, where defendant does not plead a justification, evidence that no investigation as to the truth of the matter was made before publication, because the source from which the information came had been found by experience to be reliable, is admissible to mitigate damages. — FOLWELL V. PROVIDENCE JOURNAL CO., R. I., 37 Atl. Rep. 6.

70. LIFE INSURANCE — Suicide — Burden of Proof.—In an action on a life policy, void if the assured committed suicide, the issuing of the policy and the death of the assured made a *prima facie* case for plaintiff. Defendant then read in evidence the proof of claim furnished by plaintiff, in which the cause of death by the assured was stated as "pistol shot from his own hand." This admission was unexplained and uncontradicted by plaintiff: Held, that the burden of proof was shifted to plaintiff, and a verdict was properly directed for defendant.—SPRUILL V. NORTHWESTERN MUT. LIFE INS. CO., N. Car., 27 S. E. Rep. 39.

71. LIFE INSURANCE—Surrender by Pledgee.—The surrender before maturity of an endowment policy, by one to whom it was assigned as security for a demand note, is unauthorized, and the assignee will be required to account for the proceeds, where the assignment did not provide for a surrender or sale, and no demand was made for payment of the note, and no notice given to the assignee of the intention to surrender.—MANTON V. ROBINSON, R. I., 37 Atl. Rep. 8.

72. LIMITATIONS — Fraudulent Conspiracy.—Wrongful acts or omissions of conduct performed or omitted in pursuance to a fraudulent conspiracy, and not the conspiracy itself, constitute a cause of action; and the statute of limitations begins to run from the performance of such conduct or the omission of such acts if known to the injured party, and not from the time of his discovery of such conspiracy.—RIZER V. BOARD OF COMRS. OF GEARY COUNTY, Kan., 48 Pac. Rep. 568.

73. MANDAMUS — Writ of Error.—If final judgment be rendered on a demurrer to an alternative writ of *mandamus*, a writ of error will lie.—STATE V. HUDSPETH, N. J., 37 Atl. Rep. 67.

74. MASTER AND SERVANT — Assumption of Risk.—A person, under age, who is employed in operating a dangerous machine, knowing it to be so, and being old enough to appreciate its dangers, assumes those risks which are incident to its operation, to the same extent as a person of mature years; and no action will lie against his employer for injuries received by him in such a case.—DUNN V. MCNAMEE, N. J., 37 Atl. Rep. 61.

75. MASTER AND SERVANT—Fellow-servants.—The car repairer of an electric railway is not a fellow-servant of a conductor whose death was caused by inadequacy of repairs.—DENVER TRAMWAY CO. V. CRUMBAUGH, Colo., 48 Pac. Rep. 503.

76. MINES AND MINING — Location.—When a vein of mineral-bearing rock, in its course lengthwise, after passing under the surface limits of one location, on which it outcrops, crosses nearly at right angles the side lines of another, prior location, on which it also outcrops, the side lines of such prior location becoming, by reason of the course of the vein, its end lines, the right to follow the lode in its downward course, between the vertical planes drawn through such side end lines, belongs to such prior location, and the extralateral rights of the other location cease when the vertical plane so drawn between the two locations is

reached.—TYLER MIN. CO. v. SWEENEY, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 277.

77. MORTGAGE—Assumption — Statute of Frauds.—If the grantee, in consideration of the conveyance, promise to pay a mortgage on the land given by his grantor, he thereby makes the debt his own, and such a promise is not within the statute of frauds.—THOMPSON v. CHEESMAN, Utah, 48 Pac. Rep. 477.

78. MORTGAGE — Foreclosure — Pleading.—When a suit for the foreclosure of a mortgage has been commenced, based upon a default in interest alone, and, while the suit is pending, the trustee of the mortgage, under the provisions thereof, elects to declare the principal of the bonds secured by it due because of the non-payment of interest, such election is properly the subject of a supplemental bill, but, if introduced into the suit by amendment to the original bill, objection must be made by demurrer, plea, or answer; otherwise it is waived.—SEATTLE, ETC. RY. CO. v. UNION TRUST CO., U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 179.

79. MORTGAGE — Marshaling of Securities.—A mortgagee is not chargeable with constructive notice of subsequently recorded judgments against the mortgagor which are liens on the mortgaged property, and his lien will not be postponed to that of the judgments because he permitted the debtor to divert personal property on which he also had a lien, where at the time he had no actual knowledge of the existence of the judgments.—ANNAN v. HAYS, Md., 37 Atl. Rep. 20.

80. MORTGAGES—Sale of Parcels — Release.—Where a mortgagee receives the price of a portion of the mortgaged premises sold by the mortgagor, and executes a release as to such portion, with notice, recited in the release, of a prior deed of another portion to a different grantee, who had received no release, he will be charged, in foreclosing as against such prior grantee, with the value of the land released, in reduction of the mortgage debt, unless he has already credited its value as a payment on the mortgage.—LONGSTREET v. BROWN, N. J., 37 Atl. Rep. 56.

81. MORTGAGE BY EQUITABLE OWNER.—The equitable owner of land may compel a conveyance of the legal title, and a surrender of possession, though she has given to a third person a mortgage, which has not been foreclosed, conveying her "legal and equitable estate."—LACKEY v. MARTIN, N. Car., 27 S. E. Rep. 35.

82. MUNICIPAL CORPORATIONS—Defective Sidewalks—Action Over.—The owner of a building is bound by a judgment against a city for injuries caused by an opening in the sidewalk, made and left unguarded by him, rendered in an action which he was notified by the city to defend, though he did not appear or defend, and was not a party to the action.—CITY OF PAWTUCKET v. BRAY, R. I., 37 Atl. Rep. 1.

83. MUNICIPAL CORPORATION — Division of Territory.—When a municipal corporation is divided, the old corporation retains title to all its property, unless provision is made to the contrary by the act authorizing the division.—INHABITANTS OF TOWNSHIP OF BLOOMFIELD v. MAYOR, ETC. OF BOROUGH OF GLEN RIDGE, N. J., 37 Atl. Rep. 68.

84. MUNICIPAL CORPORATIONS—Occupation Tax.—Code 1892, § 2972, giving to certain municipalities power to levy an occupation tax, "the same not to exceed fifty per centum of the State license tax upon the same callings," limits the power of the municipalities to levy on only such occupations as the State has levied upon.—TOWN OF GREENWOOD v. DELTA BANK, Miss., 21 South. Rep. 747.

85. MUNICIPAL CORPORATION — Railway Franchises—Estoppel.—A city which extends the duration of a street railway franchise in order to enable the railway company to refund its bonded indebtedness at a lower rate of interest, is estopped, after the negotiation of the new bonds on the faith thereof, from attacking the validity of the extension for want of consideration.—CITY RY. CO. v. CITIZENS' ST. R. CO., U. S. C. C., 17 S. C. Rep. 653.

86. NATIONAL BANKS—Judgments—Receivers.—While the receiver of an insolvent national bank may interpose and become a party to a suit to enforce a claim against the bank, he is not a necessary party to such a suit, and a judgment rendered against the bank by a court of competent jurisdiction, in a suit to which he is not a party, is binding upon the receiver, in the absence of fraud or collusion.—DENTON v. BAKER, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 189.

87. NATIONAL BANKS—Usury—Recovery of Penalty.—Under the Revised Statutes of the United States (section 5198), which authorize the person paying usurious interest to a national bank to recover twice the amount paid, several of the joint makers of a note on which illegal interest is paid by such parties individually cannot unite in one action to recover such penalty.—TEAGUE v. FIRST NAT. BANK OF SALINA, Kan., 48 Pac. Rep. 603.

88. NEGLIGENCE — Liability of Lessee.—Lessees of a building damaged by fire, and being repaired under a contract, are not liable to an employee of the contractor injured while working in the elevator shaft by the moving of the elevator; such use as they had of the building at the time being permissive, the elevator not being completed or having been turned over to them, though they were allowed to carry some goods by means thereof to the upper floors, and it not being shown that they, or any one in their employ, started the elevator.—REILLY v. SHANNON, Penn., 37 Atl. Rep. 95.

89. NOTARY BUBLIC — Commitment for Contempt.—A notary public has no power to commit a witness for contempt, who, having been duly subpœnæd before him for that purpose, refuses to be sworn or to give his deposition; and the statute purporting to confer such power upon him is invalid.—IN RE HURON, Kan., 48 Pac. Rep. 574.

90. NUISANCE — Powers of City Council.—Under Acts 1895, ch. 135, § 23, authorizing city councils to declare what shall constitute a nuisance, the council has no power to declare a partially burned building a nuisance, irrespective of its actual condition as affecting public or private safety and health.—CITY OF EVANSVILLE v. MILLER, Ind., 45 N. E. Rep. 1054.

91. PARTITION — Interlocutory Decree.—Where it appears, on partition of property which cannot be equitably divided by metes and bounds, but must be sold, that a contest is pending in probate court between certain of the parties over the interest of a deceased cotenant, the court may make an interlocutory decree, definitely fixing the proportion to which each party is entitled, so far as undisputed, and also the quantity belonging to the estate of the deceased cotenant, leaving the rights of the contesting claimants, as between themselves, to be determined by the probate court.—GRANT v. MURPHY, Cal., 48 Pac. Rep. 481.

92. PARTNERSHIP—Change of Membership.—The purchaser or transferee of the interest of a partner in a firm is entitled only to the interest of such partner in the assets after the liabilities of the firm are paid, and is not liable for debts of the old firm, unless he expressly or impliedly agrees to assume them.—NIX v. FIRST NAT. BANK OF PUEBLO, Colo., 48 Pac. Rep. 522.

93. PARTNERSHIP — Payment of Individual Debts.—Where a co-executor, who had wrongfully withdrawn funds of the estate, repaid the same with cash belonging to a firm of which he was a member, and with a firm check drawn to his order, and indorsed to the estate, he alone was liable to the firm, and not the estate, which had no knowledge that it was partnership money.—IN RE LAFFERTY'S ESTATE, Penn., 37 Atl. Rep. 113.

94. PRACTICE—Dismissal for Want of Prosecution.—It is not an abuse of discretion for a court to dismiss an action for want of prosecution where it was dropped from the calendar nearly three years before by a verbal agreement between the attorneys, not authorized by the defendant, to await the determination

of another action; there being no agreement filed as provided by Code Civ. Proc. § 283.—MCLAUGHLIN V. CLAUSSEN, Cal., 48 Pac. Rep. 487.

95. PRINCIPAL AND SURETY—Contribution.—An action at law by a surety for contribution lies only against the co-sureties severally for the aliquot part due from each.—ADAMS V. HAYES, N. Car., 27 S. E. Rep. 47.

96. RAILROAD COMPANIES — Consolidation.—Where railroad companies are consolidated under the statute, the consolidated company is answerable for torts of the old companies, in the absence of evidence or stipulation to the contrary.—HUTCHISON & S. R. CO. V FAIR, Kan., 48 Pac. Rep. 591.

97. RAILROAD COMPANIES — Insolvency—Judgments for Personal Injuries.—A judgment creditor of a railroad corporation, whose claim originated in the negligent act of the corporation's servants, is not entitled to be paid in preference to the holders of pre-existing liens upon the corporation's property.—FARMERS' LOAN & TRUST CO. V. NORTHERN PAC. R. CO., U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 227.

98. RAILROAD COMPANY — Mortgages—Foreclosure.—On the foreclosure sale of a railroad, then in possession of a receiver, one divisiyn of the road was sold subject to a prior mortgage, which expressly secured to the bondholders the net income of the property after default in interest. While the road was still in possession of the receiver, a suit was brought to foreclose this senior mortgage, and the existing receiver was also appointed as receiver in that suit, and continued in possession until the sale, some years later, under the senior mortgage: Held, that the purchaser at the first sale was not entitled to the net earnings of the division covered by the senior mortgage, which had accumulated in the hands of the receiver, after his appointment in the second suit, but the same belonged to the bondholders under the terms of the mortgage.—DOWNS V. FARMERS' LOAN & TRUST CO., U. S. C. C. of App., Fifth Circuit, 79 Fed. Rep. 215.

99. RAILROAD COMPANY — Mortgage Foreclosure.—A purchaser of a railroad at foreclosure sale, who resists the confirmation of the sale, and ultimately procures the setting aside of a decree of confirmation, and a release from his bid, is not entitled to be paid, out of the trust fund, his attorney's fees and expenses incurred in that behalf, but can only receive the ordinary taxable costs; and it is immaterial that the services of his counsel may have incidentally benefited the fund.—FARMERS' LOAN & TRUST CO. V. GREEN, U. S. C. C. of App., Fifth Circuit, 79 Fed. Rep. 222.

100. RAILROAD COMPANY—Negligence.—A street car company cannot be held liable for injury to one riding on a wagon which is negligently turned to cross the track when the car is but a short distance from it; the speed of the car at the time being moderate, there being no negligence in its management, and everything being done to stop it as soon as possible.—KANE V. PEOPLE'S PASS. RY. CO., Penn., 37 Atl. Rep. 110.

101. RAILROAD COMPANY—Negligence.—It was negligence, as a matter of law, for a bright, active boy, 13 years old, a trespasser on a train who knew the attendant danger, to voluntarily attempt to jump from a train which was running 20 miles an hour.—HOWELL V. ILLINOIS CENT. R. CO., Miss., 21 South. Rep. 746.

102. RAILROAD COMPANY—Negligence and Contributory Negligence. — Testimony that deceased, killed on the fourth track at a crossing, stopped a few feet before the first track, then started across, and that at the time there was a severe rain storm and it was almost as dark as night; an admission that no whistle was blown; conflicting testimony as to whether the bell was rung, and whether at the time there was a watchman at the crossing; and evidence that the train was running from 38 to 50 miles an hour—present a case for the jury, on the questions of negligence and contributory negligence.—LAIB V. PENNSYLVANIA R. CO., Penn., 37 Atl. Rep. 96.

103. RAILROAD COMPANY — Preferred Debts.—Money advanced to a railroad company at various times to pay floating debts and interest coupons, and bonds loaned it to be pledged for the price of necessary rails to be purchased, and which bonds it is unable to return, do not constitute a debt which is entitled to a preference over the mortgage bonds upon the appointment of a receiver in foreclosure proceedings.—SOUTHERN DEVELOPMENT CO. V. FARMERS' LOAN & TRUST CO., U. S. C. C. of App., Fifth Circuit, 79 Fed. Rep. 212.

104. RECEIVERS—Liability for Rent.—Where receivers appointed to take charge of railroad property took possession of a leased line, and operated it for 18 months, keeping no separate account of its earnings and expenses, but applying them for the benefit of the entire system, of which it was treated as an integral part, and the rent which fell due a few days after the appointment of the receivers was paid by them with the sanction of all parties, and the several bills under which the receivers were appointed, and the orders of court made thereon, looked to the maintenance and full preservation of the entire system, including leased lines, and the lessor was not proceeded against as an insolvent corporation, these facts, in connection with the judicial admissions from time to time that the rent which became due more than a year after the appointment of the receivers was a debt which they were required to provide for, require that the rental for the entire period during which the receivers were in possession should be treated as a receivership obligation, contracted under the authority of the court.—CENTRAL RAILROAD & BANKING CO. OF GEORGIA V. FARMERS' LOAN & TRUST CO., U. S. C. C., S. D. (Ga.), 79 Fed. Rep. 158.

105. RAILROAD COMPANY—Preference.—The purchase by a railroad company, under contracts made from about sixteen months to over two years before the appointment of a receiver, of some 20,000 tons of steel rails, to replace the old and deteriorated rails with which its track was laid, to be paid for by its notes, due in six months, renewable for six months longer at the railroad company's option, is not a purchase of supplies in the ordinary operation of the road to keep it a going concern, so as to authorize the court appointing the receiver to give the debt a preference over the mortgage debt.—LACKAWANNA IRON & COAL CO. V. FARMERS' LOAN & TRUST CO., U. S. C. C. of App., Fifth Circuit, 79 Fed. Rep. 202.

106. RAILROAD COMPANY—Stock Killing.—If horses break out of their owner's pasture lot and stray upon a railroad track, without fault on the part of the railroad company, and there are killed through the negligence of the company's servants, the negligence of the owner in permitting the horses to stray will bar him from recovering damages, for their loss. — CASE V. CENTRAL R. CO. OF NEW JERSEY, N. J., 37 Atl. Rep. 65.

107. RAILROAD COMPANY — Street Railroads—Use of Street.—A street car company, which has the right to use a street for its cars, is not guilty of negligently obstructing the street by allowing one of its cars to remain on a spur track on the street for a reasonable time for the purpose of allowing another car to pass.—FORD V. CHARLES WARNER, CO. Dela., 37 Atl. Rep. 89.

108. REMOVAL OF CAUSES.—Where local citizens, employed as day-laborers by a foreign railroad company commit a trespass under its direction, and are joined as defendants with the company in an action for the trespass, there is not a separable action against the company, which it may remove to the federal court, on the ground of diversity of citizenship between it and plaintiff; and hence a mere general allegation in toe petition for removal that the other defendants were fraudulently joined, to prevent a removal, was unavailing.—ILLINOIS CENT. R. CO. V. LE BLANC, Miss., 21 South. Rep. 748.

109. REPLEVIN—Judgment on Bond.—In replevin, a judgment against the principals and surety on the

bond is absolutely void, when rendered after the death of the surety.—WEIS v. AARON, Miss., 21 South. Rep. 763.

110. RES JUDICATA.—The decision of the court overruling motions made by the assignor and assignee to discharge property of an insolvent debtor from an attachment levied thereon is not such a final adjudication of the validity of the deed of assignment as will preclude the assignee from maintaining an action of replevin to recover the attached property, even though the sole ground for the attachment was that the deed of assignment was fraudulent, and the trial of the motions was had on oral testimony bearing on this point. The fact that the attachment was on a claim not due does not change the rule.—BLAIR v. ANDERSON, Kan., 48 Pac. Rep. 562.

111. SALE—Conditional Sales—Estoppel.—The seller of goods is not estopped from claiming title to them, on a conditional sale, by the fact that he accepted a chattel mortgage on them from the buyer in possession, foreclosed it on default, as shown by the records, and again delivered them to the buyer under the original contract; the validity of the conditional sale and the mortgaged being unquestioned.—GOODKIND v. GILLIAM, Mont., 48 Pac. Rep. 548.

112. SALES—Construction.—Under a contract for the sale of coke at 90 cents per ton, "said price to continue until there may be a general advance in the market price of coke, then and in that event the price to be the lowest rate at which coke is sold to the larger and better consumers of coke in the market," the expression "general advance in the market price of coke," must be regarded as meaning a general advance over the 90 cents per ton named in the contract, and not a general advance over what was the market price of coke at the time the contract was made.—SPANG v. RAINER, U. S. C. C. of App., Second Circuit, 79 Fed. Rep. 250.

113. SCHOOL TRUSTEE—Purchases.—A school trustee, under his authority to "provide suitable furniture, apparatus, and other articles and educational appliances necessary for the thorough organization and efficient management" of the school of his township (Rev. St. 1894, § 5920; Rev. St. 1881, § 4444), cannot buy "reading circle books" and render the township liable therefor.—FIRST NAT. BANK v. ADAMS SCHOOL TP., Ind., 46 N. E. Rep. 832.

114. TAXATION — Assessment — Ownership.—In ascertaining the ownership of property for the purposes of taxation, the record title, in the absence of actual knowledge, must control. It is unnecessary for the assessing officer to investigate all matters pertaining to the ownership of the property or the validity of the record, but he has the right to act upon the appearance of title as shown by such record.—STATE TRUST CO. v. CHEHALIS COUNTY, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 282.

115. TAXATION OF MORTGAGES IN HANDS OF AGENT OF NON-RESIDENT.—Debts owned by a non-resident of the State of Ohio, evidenced by notes and mortgages upon real estate within the State, are not taxable there, under Rev. St. Ohio, §§ 2731, 2734, 2735, although the notes and mortgages are in the hands of a resident agent, who made the loans, and collects and remits principal and interest as they become due.—JACK v. WALKER, U. S. C. C., S. D. (Ohio), 79 Fed. Rep. 138.

116. TRIAL — Instructions — Exceptions.—Exceptions to a charge to the jury, not taken until after the jury has retired, will not be noticed on appeal, especially where the objections to the charge are of such a nature that they might have been remedied had the court's attention been called to them at the proper time.—NEW ENGLAND FURNITURE & CARPET CO. v. CATHOLICON CO., U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 294.

117. TRIAL—Tender of Issues.—Code, § 895, providing that the material issues "arising upon the pleadings" shall be made up by the attorney "or by the judge," is mandatory; and where the judgment is based on issues which, though submitted by consent, wholly fail to present the real contentions of the parties, a new trial will be ordered.—TUCKER v. SATTERTHWAITE, N. Car., 27 S. E. Rep. 45.

118. USURY — Conflict of Laws.—A note on its face payable in Mississippi, though dated in Louisiana, and secured by mortgage on lands in that State, being given for a loan effected in Mississippi, where the money was paid and was to be paid back, and being given without any reference to performance under Louisiana laws, is subject to the usury laws of Mississippi.—COMMERCIAL BANK v. AUZE, Miss., 21 South. Rep. 754.

119. VENDOR AND PURCHASER — Part Performance.—An offer by letter to sell land upon terms therein stated, orally accepted by the proposed vendee, and executed by him as to part of such terms, is a valid contract of sale, as against the statute of frauds, and entitles the vendee, if in possession, to resist ejectment brought against him by the vendor, and to show by oral evidence his readiness and ability to complete the purchase according to such contract, and that his failure to do so is attributable to his vendor.—BOGLE v. JARVIS, Kan., 48 Pac. Rep. 558.

120. WATERS — Irrigation — Prorating.—Act 1879, § 4 (Gen. St. § 1722), providing for prorating water actually carried by an irrigation ditch, among all the consumers therefrom, in time of scarcity, so that all such consumers shall suffer proportionately, does not interfere with priorities, or invalidate, as between the parties, contracts for prorating.—LARIMER & WELD IRR. CO. v. WYATT, Colo., 48 Pac. Rep. 628.

121. WATERS — Navigable Waterway.—An artificial ditch connecting with a navigable stream, but constructed by private parties for the benefit of adjacent property, and which has been filled up by the owners of such property for most of its length, and abandoned for the uses for which it was designed, is not a public, navigable waterway, and is subject to condemnation for public purposes.—LIGARE v. CHICAGO, ETC. R. CO., Ill., 46 N. E. Rep. 803.

122. WATERS—Public Lands—Appropriation.—Miners and others, in the region where the artificial use of water is an absolute necessity, have the right, though not riparian proprietors, to appropriate for mining, irrigation, etc., the waters of non-navigable streams flowing through the public lands, so far as not already appropriated by others; and the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. — KRALL v. UNITED STATES, U. S. C. C. of App., Ninth Circuit, 79 Fed. Rep. 241.

123. WATER RIGHTS—Parties to Action.—A ditch company may maintain an action to secure or protect its water rights as representing its stockholders and consumers without joining them as parties. — MONTROSE CANAL CO. v. LOUTSENHIZER DITCH CO., Colo., 48 Pac. Rep. 532.

124. WILLS — Charitable Bequests — Perpetuities.—A bequest in trust, for the erection in a public park of a memorial arch in memory of Pennsylvania soldiers, upon which are to appear statues of certain Union generals, and also a statue of testator, with his name in large letters underneath, is a charitable gift; and the direction that the income of the residue of the estate be appropriated for the maintenance and repair of the monument does not violate the statute against perpetuities. — IN RE SMITH'S ESTATE, Penn., 37 Atl. Rep. 114.

125. WILLS—Naked Trust.—A provision in a will that three persons take as trustees, the real estate of testator, and devote the same to the erection and maintenance of an institution for the education of poor children, vests a naked power in the trustees; and hence, on the death of one of them before the will takes effect, the trust becomes void. — HADLEY v. HADLEY, Ind., 46 N. E. Rep. 823.